Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

ROBERT W. COLLIN,

Petitioner,

v.

RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the two courts below erred in their determination that petitioner, a white male, had failed to present evidence from which a reasonable jury could have found that respondents denied him tenure because he was married to an African-American woman and advocated racial equality for African-Americans, or that respondents retaliated against him because of his marriage, his advocacy, or his filing of a complaint of racial discrimination with the Equal Employment Opportunity Commission.

2. Whether the two courts below erred in finding that petitioner waived any objection he might have had to the participation of the Magistrate Judge where, after full disclosure of his teaching arrangement with the University of Virginia's School of Law, the Magistrate Judge offered to recuse himself, and petitioner indicated in writing his assent, not merely to the Magistrate Judge's participation, but to his rendering a final, binding decision pursuant to 28 U.S.C. § 636(a) (1994).

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STATEMENT OF THE CASE

Petitioner, a white male former assistant professor in the Department of Urban and Environmental Planning of the University of Virginia's School of Architecture, was denied tenure in 1992. He sued the University and his colleagues in the Department under 42 U.S.C. §§ 1981 and 1983 (1994), claiming that he was the victim of racial discrimination and of retaliation for protected activities. After full discovery, the United States District Court for the Western District of Virginia concluded that petitioner had failed to produce evidence on which a reasonable jury could decide in his favor and granted summary judgment for the defendants. The United States Court of Appeals for the Fourth Circuit, following a *de novo* review of the record, affirmed.

The Denial of Tenure

The gravamen of petitioner's complaint was not reverse discrimination; instead, he claimed that he was denied tenure because he was married to an African-American woman and because he advocated racial equality for African-Americans. The court of appeals, however, found that "[t]he record is bereft of evidence that the ultimate decision-making party, the Provost, reached his decision based on anything other than academic reasons." Pet. App. e.[1]

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[1] Citations to "Pet. App. ___" are to the appendix to the petition for a writ of *certiorari*, the pages of which are given letter, rather than numerical, designations.

Petitioner was hired as an assistant professor on a three-year contract in 1986. During his "job talk" – a lecture delivered by all faculty candidates – he announced, for no apparent reason, that he was dating an African-American woman and intended to marry her. App. 2008-09.[2] Thereafter, he was extended an offer and accepted. *Id.* 1895-96. Three years later, in 1989, petitioner married his fiancee and announced this fact to his colleagues in the Department of Urban and Environmental Planning. *Id.* 1923-25. Thereafter, his contract was renewed for an additional three years. *Id.* 1905-07. When he was evaluated for tenure in 1992, six of his seven departmental colleagues voted to recommend denial based on the substandard quality of his published scholarship. The Architecture School's Promotions and Reelections Committee reviewed petitioner's scholarship and agreed unanimously with the departmental recommendation. *Id.* 1674.

Petitioner appealed the negative decision of the Architecture School to the Provost of the University, Thomas Jackson. *Id.* Mr. Jackson appointed a two-person subcommittee of the University-wide Promotions and Tenure Committee to advise him in the matter. Both members of this subcommittee, neither of whom served in the Architecture School, reviewed petitioner's scholarship in detail and found it shallow, lacking in originality, duplicative of other work, and poorly written. *Id.* 1724-27, 1754-56. Provost Jackson himself reviewed petitioner's

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[2] Citations to "App. ___" are to the appendix in the Court of Appeals, prepared and filed by petitioner's counsel. *See* note 3 *infra*.

work in detail. *Id.* 1677. He agreed with the assessment of his subcommittee. In addition, he found petitioner's writing flawed by serious research errors that "fundamentally skew[ed] his conclusions." *Id.* For example, petitioner asserted in his major article, which dealt with environmental racism, that "[f]ifty-three percent of U.S. African-Americans live in the southern states of Alabama, Louisiana, Oklahoma, South Carolina, and Texas and one third of the hazardous waste landfills are located in these states." Skeptical of this assertion, Mr. Jackson checked 1990 census data, which showed that only 18.7 percent of African-Americans resided in the five listed states. In a memorandum to the file, the Provost concluded that petitioner's scholarship used facts carelessly, exaggerated claims of its originality, lacked a coherent focus, and was internally inconsistent. *Id.* 1716-19. Mr. Jackson wrote to petitioner denying his tenure application, explaining that he found "the scholarship to be deeply flawed and substantially below the quality that would be necessary for tenure." *Id.* 1721-22.

After reviewing the record *de novo*, the court of appeals concluded:

> The record is bereft of evidence that the ultimate decision-making party, the Provost, reached his decision based on anything other than academic reasons. [Petitioner] admitted in his deposition that he had no evidence of an impermissible motivation on Provost Jackson's part. The record shows that Provost Jackson considered [petitioner's] scholarship to be of inferior quality. This opinion did not stem from any discriminatory determination. Rather, it was based on Jackson's own review of [petitioner's] body of

> work in combination with the review of other members of the Promotion and Tenure Committee. Without acting as a "super personnel council," and without a hint of reliance on a discriminatory reason by this body, we cannot find that [petitioner] advanced a prima facie case of discriminatory discharge.

Pet. App. e-f.

The Claimed Retaliation

Petitioner claimed that the University retaliated against him in numerous ways, including office assignments, computer access, and unfavorable comments to a prospective employer, because of his marriage, his research on racial topics, his advocacy, his complaints to the press, and his filing of a complaint with the Equal Employment Opportunity Commission. The Magistrate Judge concluded that the respondents had pointed to legitimate non-discriminatory reasons for each action complained of, and that petitioner had offered nothing but his unsupported claims of racial or retaliatory motivation.

The Court of Appeals found:

> [Petitioner] has shown that he engaged in numerous protected activities, including his marriage, his research and advocacy, his conversations with the press, and ultimately the filing of his EEOC complaint. Taken in the light most favorable to [petitioner], the actions taken by the Department and its members could be construed as adverse. However, in each instance of alleged retaliatory action, [petitioner] has failed to establish the crucial causal connection

> between that action and his protected activities. None of the evidence of record even suggests that any of the specific actions on the part of the Department were motivated by [petitioner's] identified protected activities.

Pet. App. h-i. Moreover, the Court of Appeals went on to state that "[i]n attempting to assign error to the magistrate judge's order by asserting that such a connection exists, [petitioner] either badly mischaracterizes the evidence of record, or relies on the stray comments of non-decision makers." *Id.* at i.

Focusing specifically on the letter to a prospective employer, the Court of Appeals noted that "[n]egative references to potential employers may constitute sufficient adverse action to state a retaliatory claim." *Id.* at j, *citing Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). However, the Court went on:

> as the magistrate judge correctly noted, the letter was not sufficiently adverse to [petitioner] to serve as the basis for a Title VII claim. Although it described [petitioner's] recent activities as "bizarre" and "inconsistent," the letter was apparently motivated by a request for information from the potential employer and primarily served as a cover letter for several newspaper articles reporting [petitioner's] own comments.

Id. at j.[3]

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[3] In addition, the Court of Appeals noted that the evidence petitioner submitted concerning the letter was of "dubious [admissibility] at best." Pet. App. k. Petitioner claimed that the letter was on departmental stationery, was typed by a department secretary, and was signed by the chair of the

The Litigation

Petitioner asserted that the Magistrate Judge should have recused himself because he taught a course in Trial Advocacy at the University of Virginia's Law School and that he improperly limited petitioner's discovery efforts.

At the outset of the litigation the Magistrate Judge disclosed on the record that he regularly taught a seminar in Trial Advocacy at the Law School and invited either party to object to his participation in the case. Thus fully informed, petitioner consented in writing, not merely to the Magistrate Judge's continued participation in the case, but to his conducting the full proceeding and rendering a dispositive decision pursuant to 28 U.S.C. § 636(c) (1994). Petitioner never filed a motion to recuse the Magistrate Judge nor objected to any of the Magistrate Judge's actions until after the grant of summary judgment against him. Then, in an opposition to respondents' motion for an award of costs, petitioner for the

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department. However, "none of these indicia of reliability are apparent from the document contained in the record on appeal." *Id.* The numerous deficiencies of the record on appeal were solely petitioner's responsibility. As respondents noted in their brief in the Court of Appeals, the six-volume, 2056-page "Joint Appendix," which contains multiple copies of many documents and none of others, "was not the product of any cooperative effort" between the parties as contemplated by Fed. R. App. P. 30(b). Brief for Appellees 3 n.3. Petitioner's counsel made no effort to contact respondents concerning the appendix but apparently simply copied her entire case file, with no effort at organization or at distinguishing between items that were actually part of the record in the district court and those that were not.

first time asserted that the Magistrate Judge's participation was improper. The Court of Appeals found that petitioner had waived any objection he might have had to the Magistrate Judge's participation. Pet. App. l-m.

Petitioner also asserted without elaboration that the Magistrate Judge improperly limited his discovery. In fact, the Magistrate Judge's scheduling order gave the parties nine months for the conduct of discovery. The discovery cutoff was extended by the Magistrate Judge twice at petitioner's request. Nonetheless, petitioner failed to depose a single defendant or the decisionmaker, Provost Jackson.

On this issue, the Court of Appeals noted that

> [petitioner] cites no document in the record before us and fails to identify error in a single ruling on the part of the magistrate judge with respect to discovery. Neither does he make any discovery ruling a part of the record on appeal. Furthermore, [petitioner] does not proffer what he expected to discover but for the alleged errors of the magistrate judge. Consequently, [petitioner's] bald allegation of error in discovery does not give this court cause to disturb the magistrate judge's ruling.

Pet. App. m.

REASONS TO DENY THE WRIT

This Case Presents No Issues of National Significance, but Turns Solely Upon the Factual Determinations of the Two Courts Below.

The petition presents no reason why this Court should grant the writ of *certiorari*. It points to no conflict between the decision below and any other lower-court decision on any issue of law. There is no decision of this Court that conflicts with the decision below. Nor does the case present any issue of great national significance requiring resolution by the Court. Instead, the petition obliquely and tendentiously seeks to reargue the factual conclusions reached by the two courts below, and it does so without rational or comprehensible citation to evidence in the record. The courts below merely determined that petitioner had failed to carry his burden of production under established and well-understood standards for the grant of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Moreover, it is well established that this Court does not sit to review factual determinations, especially where they are the product of agreement between two lower courts. *E.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n. 5 (1985); *United States v. Doe*, 465 U.S. 605, 614 (1984); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975). *See also, e.g., Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918).



CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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